Indian Overseas Bank v Goh Teng Hoon

HIGH COURT (SINGAPORE) – SUIT NO 4070 OF 1982
RAJAH J
16 SEPTEMBER 1988

Banking – Guarantee – Guarantor resigned from directorship of borrower company – Guarantor alleged service of notice of termination on bank – Whether notice was handed to bank – Whether any one guarantor can unilaterally serve effective notice of termination – Allegation of oral agreements – Whether admissible – Evidence Act (Cap 97, 1985 Ed), ss 93 & 94

By four contracts in writing dated 20 June 1973, 18 October 1973, 10 April 1974 and 4 May 1976 between the plaintiffs and the defendant and two others, the defendant and two others jointly and severally agreed to guarantee the payment on demand of all advances made by the plaintiffs to Hon Huat Enterprise Pte Ltd ('Hon Huat'), including all interest, commissions and banking charges thereon. It was an express term of each of the said contracts that the defendant and two others should not be liable for amounts exceeding $600,000, $500,000, $1,000,000 and $600,000 under each of the first, second, third and fourth guarantees respectively together with interest, costs and charges thereon. The plaintiffs claim that they made advances to Hon Huat which together with interest, commissions and banking charges amount to $938,619.58. The defendant says that he resigned as director of Hon Huat on 21 March 1977 and alleges that in accordance with cll 5 and 9 of the guarantees, he gave notice both of his resignation as director of Hon Huat and of his rescission of the four guarantees to the plaintiffs by letter of 29 March 1977 to the plaintiffs' manager. The defendant contends that by the aforesaid letter he has determined the four guarantees and that he has discharged himself from all future liability thereunder after 29 March 1977. Further in the alternative the defendant pleads that at the time of and in consideration of the defendant entering into each of the subsequent guarantees, the plaintiffs orally agreed with and warranted to the defendant, as agreements collateral to the signing of each new guarantee, that all existing guarantee(s) would be superseded by the fresh guarantee to be signed. The defendant alleges that he, relying on the said oral agreements and warranties, duly signed the three subsequent guarantees, each one to supersede the previous one. The defendant therefore maintains that if at all he is liable under the guarantees, it is in respect only of the guarantee of 4 May 1976 and such liability terminated upon the giving of his aforesaid notice of 29 March 1977. The following issues were considered by the court: (a) with regard to the non-cancelled pronouns in the standard form guarantees, whether they should be read in the singular or plural; (b) whether the defendant's letter of 29 March 1977 was ever written, and if it was, whether the said letter was served on the plaintiff; (c) plural words having been written into cll 5 and 9 of the guarantees, whether the defendant could solely absolve himself of liability by serving the aforementioned letter; (d) whether the plaintiffs and the defendant had orally agreed that in cconsideration of the latter entering into each new guarantee that the existing guarantee would be superseded by the fresh one; and (e) if such oral agreements had been made, whether they were admissible in evidence.

Held, allowing the application:

(1) The non-cancelled pronouns in the standard form guarantees should be read in the plural and not the singular.

(2) No letter dated 29 March 1977 was ever drafted or that any letter cancelling the guarantees was ever served on the plaintiff bank. This finding alone should be enough to dispose of the defendant's case.

(3) In the instant case even if notice of cancellation had been served as alleged by the defendant on the bank, such notice did not absolve the defendant from liability for drawings on the customer's account subsequent to 29 March 1977.

(4) There were no such oral agreements as alleged by the defendant in regard to and before the execution of the second, third and fourth guarantees.

(5) In view of cl 10 and ss 93-94 of the Evidence Act, such oral agreements, even if made, would not be admissible to vary or limit the operation of the three so-called superseded guarantees.

(6) Judgment for the plaintiffs was ordered in the sum of $938,819.58 and costs and interest at 8% pa from date of writ to date of judgment.

Cases referred to

1 *Egbert & Ors* v *National Crown Bank* [1918] AC 903 (folld)
2 *Kalil* v *Standard Bank of South Africa Ltd* [1967] 4 SA 550(AD) (not folld)

Legislation referred to

Evidence Act (Cap 97, 1985 Ed) ss 93, 94

Tan Tee Jim for the plaintiffs.
KS Chung for the defendant.

Cur Adv Vult

Rajah J: At all material times Hon Huat Enterprise Pte Ltd (hereinafter referred to as 'Hon Huat') were customers of the plaintiffs, who carry on the business of banking in Singapore.

By four contracts in writing dated 20 June 1973, 18 October 1973, 10 April 1974 and 4 May 1976 between the plaintiffs and the defendant and two others, the defendant and two others jointly and severally agreed for the consideration therein set out to guarantee the payment on demand of all advances made by the plaintiffs to Hon Huat including all interest, commissions and banking charges thereon.

It was an express term of each of the said contracts that the defendant and two others should not be liable for amounts exceeding $600,000, $500,000, $1,000,000 and $600,000 under each of the first, second, third and fourth guarantees respectively together with interest, costs and charges thereon. Further it was also expressly agreed under cl 10 of each guarantee 'that this guarantee and the powers and provisions herein contained are in addition to and not by way of limitation of or substitution for any former or other guarantees or guarantee heretofore given to you by me/us (whether jointly with some other persons or alone) and now existing uncancelled and that this guarantee is not intended to and shall not revoke or limit such other guarantee or guarantees'.

The plaintiffs claim that, in pursuance of the said contracts and not otherwise, they made advances to Hon Huat which together with interest, commissions and

banking charges amount to $938,619.58, particulars of which are set out in para 5 of the amended statement of claim as follows:

(a) Amount transferred from cash credit account together with interest up to 8 September 1981 $19,380.08

(b) Amount transferred from trust receipt bills nos C2608/78, C2742/78, C31/79, C32/79, C2806/78 C3130/78, C3222/78, inclusive of interest up to 8 September 1981, full particulars of which are as follows –

				c/f	$ 19,380.08
Bill number	*Bill number*	*Interest*	*Percentage*	*Total*	
C2608/78	58,771.00	23,505.68	5.50	82,282.18	
C2742/78	78,441.00	28,294.14	5.50	106,740.64	
C2806/78	59,134.00	22,538.45	5.50	81,677.95	
C3130/78	74,189.50	25,612.98	5.50	99,807.98	
C3222/78	74,123.70	25,402.91	5.50	99,532.11	
C31/79	136,050.00	46,209.94	5.50	182,265.44	
C32/79	136,050.00	46,209.94	5.50	182,265.44	$834,571.74
					$853,951.82
Add: interest on $616,759.20 from 10 September 1981 to 15 September 1982					$ 84,867.76
					$938,619.58

In his amended defence the defendant says that the said four guarantees, which are all in printed standard form, were executed by him in his capacity as director of Hon Huat.

The defendant says that he resigned as director of Hon Huat on 21 March 1977 and alleges that in accordance with cll 5 and 9 of the guarantees he gave notice both of his resignation as director of Hon Huat and of his rescission of the four guarantees to the plaintiffs by letter of 29 March 1977 to the plaintiffs' manager which reads as follows:

> Dear sir,
>
> Re:Personal Guarantee for Hon Huat Enterprise (Pte) Ltd
>
> I am writing to inform you that I have now resigned my directorship from the above captioned company on 21 March 1977, therefore, this notice will rescind all my previous guarantee and pledge whatsoever, and discharge myself from all responsibility of business activities between the company and your bank hereafter.
>
> Please let me know at your early convenience if there is anything not in order.
>
> Thank you in advance for your kind attention in this matter.
>
> Yours faithfully
> Sgd: Goh Teng Hoon

Clauses 5 and 9 of the guarantee read:

> (5) And I/we further declare that this guarantee shall not be affected by my our/death or any of our deaths but shall remain in full force and effect until cancelled by me/us and shall continue to be binding notwithstanding any changes which may from time to time take place in the partners or constitution of my/our firm or in the principal's constituent companies or other business.
>
> (9) And it is further agreed and declared that this guarantee shall be a continuing guarantee irrespective of any sum or sums which may be paid into the account of the principal at any time during continuance of the guarantee and shall remain in force until cancelled by my/our written authority. The amount then due to be subject to this guarantee and secured thereby.

The defendant contends that by the aforesaid letter he has determined the four guarantees and that he has discharged himself from all future liability thereunder after 29 March 1977. The defendant admits that he is liable under the four guarantees up to 29 March 1977 but contends that all further transactions between Hon Huat and the plaintiffs subsequent to that date were not under the four guarantees but at the risk of the plaintiffs.

Further in the alternative the defendant pleads that at the time of and in consideration of the defendant entering into each subsequent guarantee, namely, those dated 18 October 1973, 10 April 1974 and 4 May 1976, the plaintiffs orally agreed with and warranted to the defendant as agreements collateral to the signing of each new guarantee with the intent that the plaintiffs should rely thereon that all existing guarantee(s) would be superseded by the fresh guarantee to be signed, in consequence whereof the defendant:

(a) executed the guarantee dated 18 October 1973 by virtue of the plaintiffs' agreement and warranty that this guarantee would supersede the guarantee dated 20 June 1973;

(b) executed the guarantee dated 10 April 1974 by virtue of the plaintiffs' agreement and warranty that this guarantee would supersede the two previous guarantees dated 20 June 1973 and 18 October 1973;

(c) executed the guarantee dated 4 May 1976 by virtue of the plaintiffs' agreement and warranty that this guarantee would supersede the three previous guarantees dated 20 June 1973, 18 October 1973 and 10 April 1974.

The defendant alleges that he, relying on the said oral agreements and warranties, duly signed the three subsequent guarantees, each one to supersede the previous one.

By virtue of the oral agreements to the effect that the previous guarantees were to be superseded, the defendant maintains that if at all he is liable under the guarantees, which is denied, it is in respect only of the guarantee of 4 May 1976 and such liability terminated upon the giving of his aforesaid notice of 29 March 1977.

As I see it the issues before the court are:

(1) in view of the non-cancellation of certain pronouns in the four printed standard form guarantees and of the fact that all these four guarantees were joint guarantees signed by three persons, should the plural or singular form of the non-cancelled words be read into the four guarantees;

(2a) Was the alleged letter of 29 March 1977 ever written as alleged by the defendant, that is, was it in the first instance composed, as alleged by the defendant, by one Effrendi, and

(2b) was it delivered to the bank as alleged, that is to say, by the defendant handing it over to Julius Ang who was an adviser to the bank;

(3) the plural words having been written into cll 5 and 9 of the guarantees can any one of the three joint guarantors unilaterally serve on the bank an effective notice of cancellation of the four guarantees absolving himself from further liability for drawings subsequent to the service of such a notice of cancellation;

(4) were the last three guarantees executed in the circumstances and manner alleged by the defendant, that is to say, did the plaintiffs through Julius Ang in fact orally agree with and warrant to the defendant and the other two guarantors that such oral agreements were collateral to the signing of each new guarantee and that all existing guarantees would be superseded by the fresh guarantees to be signed;

(5) if there were such oral agreements, is oral evidence of such agreements admissible, taking into consideration cl 10 of the guarantees and ss 93-94 of the Evidence Act (Cap 97, 1985 Ed).

Issue 1

An examination of the four guarantees shows that they have been executed on a printed standard form, and that some of the printed words therein were not cancelled before the four guarantees were executed by the three guarantors. It is common ground that the four guarantees had been executed by the three guarantors and it is not disputed that the said four guarantees were acted upon by all the parties concerned. The question which now arises is which of the non-cancelled words, if at all, are to be read into the four guarantees. Quite obviously some of the words must be read into the documents to make sense of them and to give them efficacy. For these reasons I hold that some of the words be left out of the four guarantees and that the words to be so left out be the singular pronouns and not those in the plural.

Issue 2(a) and (b)

The letter of 29 March 1977 goes to the root of the whole case. Was it given to Julius Ang as alleged by the defendant or was he merely concocting a piece of evidence to bolster his case for non-liability? On this issue only the defendant gave direct evidence whilst DW2 gave hearsay evidence of his conversation with Julius Ang. On this issue I found the evidence of both the defendant and that of DW2, a private investigator who had been hired by the defendant expressly to obtain confirmation of his act of giving to Julius Ang the letter of 29 March 1977, unsatisfactory. I got the impression DW2 had been brought into court merely to give credence to and bolster the case of the defendant that he had handed to Julius Ang the said letter of 29 March 1977. I am of the view that neither the defendant saw Julius Ang on 29 March 1977 to hand him the letter of the same day nor did the private investigator interview Julius Ang as claimed by him or at all. There were arguments by counsel as to who should have called Julius Ang to give evidence. The plaintiffs claimed not to know of the whereabouts of Julius Ang whereas the private investigator claimed to know where Julius Ang was and that he had seen him only about two weeks before he himself had given evidence in court. I would have thought it was in the defendant's interest to call Julius Ang as it was his case that he had handed the letter to Julius Ang. It also seems to me that had the defendant wished to serve a notice of cancellation on the bank as he alleges he did such notice would have been served not on Julius Ang, a person who had no authority to act for the bank in such matters, but on the manager of the bank or some other bank officer with whom the defendant had been dealing. Again it was the defendant's evidence that he had not drafted the letter and that it was his friend Effrendi who had drafted the letter for him. What can be more simple than to have him called to give such evidence, but no such evidence was before the court nor was there any explanation as to why Effrendi was not called. I disbelieved both the evidence of the defendant and his witness Tan Soon Tee (DW2) on this issue.

In the circumstances it is my view that no letter dated 29 March 1977 was ever drafted by Effrendi or that any letter cancelling the guarantees was ever served on Julius Ang as alleged or on any officer in the bank. This finding alone should be enough to dispose of the defendant's case.

Issue 3

It was the plaintiffs' case that, even if the letter of cancellation of 29 March 1977 was served as alleged by the defendant, a unilateral cancellation by the defendant was ineffective to free himself of his liability under his guarantees. Counsel for the plaintiffs cited and relied on the Privy Council case of *Egbert & Ors* v *National Crown Bank*.[1] In this case:

> By an agreement the six signatories thereto jointly and severally agreed with a Canadian bank to guarantee repayment up to a fixed sum of all liabilities (including interest) which a

customer had or should incur to the bank: it was provided that the agreement should be a continuing guarantee 'until the undersigned, or the executor or administrator of the undersigned, shall have given the bank notice in writing to make no further advances on the security of this guarantee. ... Subsequently one of the signatories died and his executors gave notice purporting to terminate the liability of the estates of the deceased under the guarantee.

Held: (1) that the guarantee remained in force against all the guarantors until each and all of them, or their respective executors or administrators, gave notice to determine it.

The material portion of the guarantee with regard to the notice of cancellation is as follows:

> And this shall be a continuing guarantee and shall cover all liabilities which the customer may incur or come under until the undersigned or the executors or administrators of the undersigned, shall have given the bank notice in writing to make no further advances on the security of this guarantee.

Lord Dunedin delivering the judgment of the Privy Council had this, inter alia, to say:

> Their Lordships are of the opinion that this clause stipulates that the guarantee is to remain in force until there is a notice given by each and all of the guarantors, the executors of any deceased co-signatory coming in his place. Such a stipulation is in accordance with the literal meaning of the words, and is in harmony with what might be expected, looking to the position of the persons who were granting the obligation. Further, if it had been sought to allow any one to bring the guarantee to an end, either for himself or for all, nothing would have been easier than to express such an intention by such words as 'all or any of the undersigned', or other appropriate expression. This disposes of the first ground of defence in both its alternatives.

As against this, counsel for the defendant cited the South African case of *Kalil* v *Standard Bank of South Africa Ltd*,[2] the headnote of which reads:

> Respondent bank had successfully claimed summary judgment against appellant in a Provincial Division for a sum owing by a certain company. The claim was based on a bank form numbered 30b called 'guarantee by two or more sureties' which constituted a continuing guarantee to the bank by the appellant and four other signatories for the payment to the bank by the company of any amount due then or thereafter by the company to the bank in respect of the company's account at the specified branch of the bank. It was stipulated that 'this guarantee ... shall remain in force as a continuing guarantee ... notwithstanding the death or legal disability of any of us until the ... branch of the bank shall have received notice from us, or from our respective executors, trustees or other legal representatives as the case may be, terminating the same ...'. In an appeal, it appeared that the appellant's defence was that he had, on resigning as a director of the company, informed the bank that he was terminating his liability to the bank under the written guarantee as from that date, ie in respect of any future debts incurred. The court a quo had upheld the contention of the bank that the guarantee could only be terminated by a collective notice from all the co-guarantors.
>
> *Held*: that, generally speaking, a surety under such a continuing guarantee had, apart from an express or clearly inferential provision to the contrary in his contract, a right to bring about a termination of such a continuous liability by notices duly given to the holder of the guarantee.
>
> *Held*: further, regard being had to the document as a whole, that express provision had only been made for the termination by notice of the guarantee as a whole as a continuing security and that the bank had failed, expressly or inferentially, to stipulate for the removal of the right of an individual to bring to an end, by notice duly given, his continuous liability for future obligations.

Williamson JA in concluding his judgment says:

> For that reason the application for summary judgment should have been refused by the court a quo. That court, in arriving at the opposite conclusion, relied strongly on the decision of the Privy Council in England in regard to the construction of a very similar document which had been executed in Canada; see *Egbert & Ors* v *National Crown Bank* [1918] AC 903. We were referred to certain differences between the words of that document and the present document; but I do not deem it necessary to consider them. I find nothing in the extremely brief reasons of the Privy Council, for holding that such a clause takes away the right of an individual co-surety (in that case the executors of a deceased signatory) to terminate his liability by notice, which persuades me that my view of the effect to be given to the clause hereunder consideration should be other than what I have concluded it is.
>
> For these reasons the appeal is allowed with costs and the judgment of the court a quo altered to one dismissing the application for summary judgment with costs.

It is not for me to say whether the learned South African judge here is correctly expounding the law relating to guarantees in South Africa but so far as I am concerned I am bound by the decision of the Privy Council in the abovementioned case of *Egbert & Ors* v *National Crown Bank*.[1] For these reasons I am of the view that in the instant case even if notice of cancellation had been served as alleged by the defendants on the bank such notice did not absolve the defendant from liability for drawings on the customer's account subsequent to 29 March 1977.

Issue 4

On the evidence before the court, I am satisfied that no such oral agreements as alleged were reached before the second, third and fourth guarantees were signed. Here again I do not accept the evidence of the defendant as to what happened immediately before the second, third and fourth guarantees were executed by the guarantors. According to the defendant's evidence the other two guarantors were also present when Julius Ang orally agreed that the signing of the second guarantee would put an end to the first guarantee, that the signing of the third guarantee would put an end to the second guarantee and that the signing of the fourth guarantee would put an end to the third guarantee. The other two guarantors to the four guarantees, so far as the court is aware, are in Singapore and could have been called by the defendant,

which they were not. In the circumstances I find as a fact that there were no such oral agreements as alleged by the defendant in regard to and before the execution of the second, third and fourth guarantees.

Issue 5

In view of cl 10 and ss 93-94 of the Evidence Act, it seems to me that such oral agreements, even if in fact they had taken place, cannot be admitted to vary or limit the operation of the so-called superseded three guarantees.

For these reasons there will be judgment for the plaintiffs in the sum of $938,819.58 and costs and interest at 8% pa from date of writ to date of judgment.

Application allowed.

Solicitors: *Donaldson & Burkinshaw*; *Chung & Co.*

Reported by *Wong Kim Fatt*

Re Ram Goswami

HIGH COURT (SINGAPORE) – ORIGINATING SUMMONS NO 917 OF 1987
WEE CHONG JIN CJ, LAI KEW CHAI AND THEAN JJ
13 SEPTEMBER 1988

Legal Profession – Disciplinary proceedings against advocate and solicitor – Forfeiture of bail – Advocate and solicitor mitigating in terms which were untrue – Deception of court – Whether professional misconduct – Legal Profession Act (Cap 161, 1985 Ed), s 80(2)(b) & (h)

Evidence – Hearsay evidence – Whether prejudicial – Evidence of accomplice – Whether corroboration required – Evidence Act (Cap 97, 1985 Ed), ss 135 & 169

The respondent, an advocate and solicitor, appeared before a disciplinary committee appointed to hear and investigate a complaint against him. The substance of the complaint was that the respondent, while acting for one Abdul Hamid who was ordered in two criminal cases in the District Court to show cause why his bail money of $50,000 should not be forfeited, did mitigate to the court in terms which he knew were untrue as the bail money, contrary to the mitigation made, was not the 15 years' savings of the bailor nor did it belong to or was provided by the bailor. The respondent said that, at the time of making the mitigation, he did not know that the bail money was Hamid's.

The committee found that the respondent knew all along that the money never belonged to Hamid and was satisfied beyond reasonable doubt that the respondent had mitigated to the court in terms which he knew or ought to have known were untrue, and had thereby wilfully and falsely misrepresented to the court the true state of affairs. Accordingly, the committee determined that the respondent was guilty of grossly improper conduct in the discharge of his professional duty within the meaning of s 80(2)(b) of the Legal Profession Act (Cap 161, 1985 Ed) ('the Act'). The respondent was also found guilty of such conduct as would render him liable to be disbarred or struck off the roll of the court or suspended from practice or censured if a barrister or solicitor in England, due regard being had to the fact that the two professions are fused in Singapore, within the meaning of s 80(2)(h) of the Act.

In proceedings before the High Court following the findings and determination of the committee, the respondent challenged the findings of the committee. He contended that there were contradictions in the evidence of Hamid given before the committee. He also contended that hearsay evidence had been admitted which had gravely prejudiced him. It was also argued for the respondent that the committee had erred in drawing wrong inferences and in failing to draw an adverse inference regarding the Law Society's failure to call as witnesses the alleged owners of the bail money. He also contended that, although the conclusion of the committee made Hamid an accomplice, the committee failed to touch on this aspect. Another point taken was that Hamid was hostile to the respondent and had concocted evidence against the respondent.

Held, ordering that the respondent be suspended from practice for a period of six months and that he pay the costs of the proceedings before the court and the committee:

(1) The committee had found correctly in being satisfied beyond reasonable doubt that the respondent did mitigate to the court in terms which he knew were untrue as the bail money was not the 15 years' savings of Hamid nor did it belong to or was provided by Hamid.

(2) There was no merit in the submission that prejudicial hearsay evidence had been admitted. The committee's findings did not rely on the alleged prejudicial hearsay evidence. In any event, even if the committee ought not to have admitted the evidence, this was a case where s 169 of the Evidence Act should be invoked.

(3) Section 135 of the Evidence Act as amended by Act No 11 of 1976 since 1 January 1977 provides that an accomplice shall be a competent witness against an accused person and that any rule of law or practice whereby at a trial it is obligatory for the court to warn itself about convicting the accused on the uncorroborated testimony of an accomplice is thereby abrogated.

(4) It is imperative that advocates and solicitors of the Supreme Court maintain at all times the highest standard of integrity in court. It is clearly professional misconduct for an advocate and solicitor to engage in any sort of deception of the court. The committee was correct in determining that the respondent was guilty of grossly improper conduct in the discharge of his professional duty within the meaning of s 80(2)(b) of the Legal Profession Act. There was also no doubt that the respondent's conduct came within the scope of s 80(2)(h) of the same Act.

Legislation referred to

Advocates and Solicitors (Disciplinary Proceedings) Rules 1963
Evidence Act (Cap 97, 1985 Ed) ss 135, 169
Legal Profession Act (Cap 217, 1970 Ed) s 84
Legal Profession Act (Cap 161, 1985 Ed) s 80

Spencer Gwee for the Law Society.
Leo Fernando for the respondent.

Cur Adv Vult